IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

NO. 506

MAY S. TONKIN and PEOPLES-PITTSBURGH TRUST COMPANY, Executors of the Estate of John B. Tonkin, Petitioners,

v.

THE UNITED STATES, Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

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OPINIONS.

The opinion of the District Court of the United States for the Western District of Pennsylvania, under which judgment was entered for petitioners in the amount of $45,930.95, is reported in 56 F. Supp. 817. The opinion of the Circuit Court of Appeals is reported in 150 F. (2d) 531.

JURISDICTION.

Jurisdiction is invoked under Section 240 of the Judicial Code as amended and more particularly because an important question of federal law is involved which has not been, and should be, settled by this court.

STATEMENT OF THE CASE.

During 41 years of employment with Standard Oil Company of New Jersey interests, John B. Tonkin had acquired more than 10,000 shares of the stock of that corporation. He had discussed the lack of diversification in his holdings with his brother, Loring Tonkin, and with banking and insurance men. As a result of these discussions he purchased five annuity contracts from various insurance companies for $75,415 from which he received $6217.48 annually. (R 10 a)

At about the same time Tonkin created a trust at the Peoples-Pittsburgh Trust Company under the terms of which he transferred the following assets to the trustee: (R 5 a, 27 a, 35 a)

(1) 2204 shares of Standard Oil Company stock;

(2) Three policies of life insurance aggregating $36,300 (these policies were taken out many years before by the settlor and were transferred to the trustee without retaining any incidents of ownership);

(3) Six policies of insurance aggregating $40,000 (the settlor retained control over these policies and the executors included them in his gross estate; they are therefore not involved in this proceeding).

Under the terms of the trust agreement his wife was the principal beneficiary, the other beneficiaries being his brothers and sisters and their children. The trust agreement contained no provision for a reverter of any of the assets to the settlor under any circumstances. (R 31 a)

By the terms of the trust Mrs. Tonkin, who was the principal beneficiary, could ask the trustee to purchase

either ordinary or single premium life insurance policies. Shortly after the creation of the trust, she instructed the trustee to purchase single premium life insurance policies. The trustee thereupon sold the 2204 shares of Standard Oil stock and purchased single premium life insurance policies having a face value of $200,000. (R 30 a, 6 a)

Under the terms of the trust the trustee was not required to retain these policies but could in its discretion surrender them and invest the proceeds in other investments. (R 30 a)

In 1937 Tonkin was past the age for retirement from the Peoples Natural Gas Company of which he was president and decided to retire. At the time of his retirement he was, according to Dr. McMurray, his family physician, in excellent health. He had plans for travelling and enjoying a long life. He often said that he would outlive his father, who died at the age of 92. (R 53 a) After his retirement, Tonkin built a new house at Madison, Ohio and opened a new office in Pittsburgh for the transaction of such business as he might have. He continued to be director of a number of banking and charitable organizations. (R 45 a)

While in Florida in the winter of 1940 he contracted pneumonia and died. (R 54 a)

The Commissioner determined the estate tax liability by including $238,803.76 in the gross estate of the decedent made up of

(1) $200,042.98, the proceeds of the five single premium policies.

(2) $36,920.52, the proceeds of three life insurance policies irrevocably assigned to the trustee.

(3) $1,840.26, the uninvested cash in the trust at decedent's death. (R 12 a)

Tonkin's executors paid the tax on these items under protest and filed the present suit. The case was heard by Judge Robert M. Gibson in the District Court for the Western District of Pennsylvania and resulted in a judgment for the plaintiffs in the amount of $45,930.95 with interest. (R 59 a) On appeal by the government judgment was reversed by the Circuit Court of Appeals.

SPECIFICATION OF ERRORS.

1. The Circuit Court erred in concluding that an unintentional and involuntary reverter which might be occasioned by the death of all the designated beneficiaries of a trust was the equivalent of a reverter expressly reserved by the settlor and consequently made the transfer of the trust assets taxable.

2. The Circuit Court erred in reversing a finding of the trial court that a transfer was not made in contemplation of death, which finding was not challenged by the government and not presented to the Circuit Court for consideration.

3. The Circuit Court erred in concluding that the purchase of annuities by Tonkin and the complete and final transfer of stock to the trustee constituted an indivisible transaction which made *all* of the assets of the trust taxable.

SUMMARY OF ARGUMENT.

The trust created by Tonkin in 1936 contained no provisions for any reversionary interest to him under any circumstances. In the Goldstone case the insured specifically provided for the reversion to him of rights under the annuity and single premium contracts if his wife should predecease him. The Goldstone case was not intended to apply to a case where the settlor retained no string and where the only reverter that is possible is one by operation of law in the event that all of the beneficiaries named in the trust died before the settlor.

The position taken by the government at the trial of this case, that the trust was created by Tonkin in contemplation of death, was abandoned by it on appeal. The Circuit Court was therefore not warranted in reversing the findings of the lower court and concluding that the gift was made in contemplation of death.

The purchase of annuities by Tonkin was, as the District Court found, a separate and independent transaction. The transfer of 2204 shares of Standard Oil stock to the trustee was complete and final. The action of Mrs. Tonkin and the trustee in selling the stock and purchasing single premium policies was voluntary and for Mrs. Tonkin's benefit. It was of no concern to Tonkin whether single premium policies were purchased or not. Even if they were purchased the trustee could change the investment later.

The proceeds of the single premium policies were therefore not taxable as a transfer intended to take effect in possession or enjoyment at or after death.

The opinion of the Circuit Court does not dispose of the proceeds of the ordinary life policies amounting to $36,920.52 and the cash in the trust amounting to $1840.26.

Certiorari should be granted to determine whether the Goldstone case applies to all trusts in which the beneficiaries are mortal and to determine the taxability of the two items which are not covered by the Circuit Court's opinion.

ARGUMENT.

The position of the government in the trial court was that the following three items

(1) $200,042.98, the proceeds of five single premium life insurance policies purchased by the trustee after the creation of the trust
(2) $36,920.52, the proceeds of three ordinary life insurance policies purchased by the settlor many years before and
(3) $1840.26, cash in the trust,

were includible in decedent's gross estate, because,

(1) The transfer of all the assets by the settlor to the trustee was made in contemplation of death and therefore all three items were taxable,

(2) The transfer by the settlor of 2204 shares of stock to the trustee was intended to take effect in possession or enjoyment at or after death and therefore the first item, to-wit, $200,042.98, the proceeds of the single premium policies purchased by the trustee was includible in decedent's gross estate. This ground con-

cedes that items (2) and (3) are *not* taxable and a refund is proper.

On appeal the government abandoned the first ground and limited its appeal and its argument to the proposition that the item of $200,042.98 was includible in decedent's gross estate as a transfer intended to take effect in possession or enjoyment at or after death. (See government's brief in Circuit Court, page 7).

On appeal the government also injected a new argument into the case, namely, the taxability of all three assets, because of a possibility of reverter, if all of the beneficiaries named in the trust died. The Circuit Court of Appeals reversed the judgment entered by the lower court on the ground that the case was controlled by the decision in the Goldstone case. The reasons given by Judge Martin were that the transfer was made in contemplation of death and there was a possibility of reverter of all of the assets to the settlor.

A.

The Decedent Retained No Reversionary Interest in the Trust.

The novel question in this case is whether a transfer to a trustee is taxable where there are no provisions in the trust for any kind of reversion to the settlor, but where the beneficiaries are all mortal and may die before the settlor, so that the assets might, by operation of law, revert to the settlor.

The Circuit Court held that such a reverter by operation of law came within the purview of the Goldstone case and made all the trust assets taxable.

The Goldstone case involved the purchase by the decedent of two contracts—one, a single premium life insurance policy; the other, an annuity. The decedent gave to his wife the unrestricted rights under both contracts, but he provided that if she died before he did, those rights reverted to him. This court held that the decedent retained "possession of a reversionary interest" in the proceeds of both contracts, and the proceeds were therefore includible in the gross estate of the decedent under Section 302(c) as a transfer "intended to take effect in possession or enjoyment at or after death." It was specifically said in the Goldstone case:

> "The essential element in this case, therefore, is the decedent's possession of a reversionary interest at the time of his death, delaying until then the determination of the ultimate possession or enjoyment of the property."

Does the Goldstone case control a case where the settlor attached no strings to the property which he transferred? There is no provision in the deed of trust created by Tonkin by which he retained any interest or control over the property.

It is true that in his trust, as in all other trusts, where the beneficiaries are mortal and may die before the settlor—the assets would not escheat, but would ultimately return to the estate of the settlor. But such a remote possibility of reverter by operation of law has never been considered either by this court or by any other court as making a gift taxable. Indeed Judge Biggs of the Third Circuit ably expressed the prevailing view that a possibility of reverter, which arbitrarily attaches to every trust in whch the beneficiaries are mortal, does not make a gift, a transfer to take effect at or after death: *Com. v. Kellogg,* 119 F. 2d 54 (C.C.A.

3, 1941); *Lloyd's Estate v. Commissioner,* 141 F. 2d 758 (C.C.A. 3, 1944).

It has been unequivocally stated on many occasions that there is no possibility of reverter unless "a string or tie was inserted in the trust indenture whereby the grantor might pull back the corpus to himself upon the happening of some contingency terminable only by his death": *Com. v. Kellogg,* 119 F. 2d 54 (C.C.A. 3, 1941).

At the time of the oral argument in the instant case it was stated in reply to a question put by Judge Biggs that 29 people would have to die, before Tonkin died, to create the situation in which there would be a reverter. A complete failure of an entire family line resulting in the reversion of assets to the settlor by operation of law is not a string or tie which the settlor attached to the gift. It would be a reversion in spite of everything the settlor did to relinquish all interest in the gift.

Indeed, only a few weeks before the decision in the instant case, the Third Circuit Court carefully distinguished between a transfer in which the settlor reserved a "positive power" and a transfer where the reversion was merely "passive" by the operation of law: *Eldredge v. Rothensies,* 150 F. 2d 23 (1945).

If Judge Martin is correct in holding that there is no difference between a gift in which the settlor retained a string and a gift in which he retained no string, then every trust that does not have a corporate beneficiary would become taxable under Section 302(c) as a transfer intended to take effect in possession or enjoyment at or after death. Such a conclusion extends the provisions of the taxing statute for beyond its obvious scope. It, furthermore, makes it impossible for any gift to be made, no matter how irrevocable or final

in which a man designates his family and next of kin as beneficiaries, without subjecting it to the federal estate tax.

There is another error in Judge Martin's opinion. He does not say that this possibility of reverter by operation of law results in making the trust a transfer to take effect in possession or enjoyment at or after death. He says that this possibility of reverter results in a transfer *in contemplation of death.*

This conclusion does not follow from the premises nor from anything that was said in the Goldstone case by this court.

The instant case is entirely different from the Goldstone case. The only similarity is in the fact that there were annuities and single premium policies involved in both cases. But this surface similarity should not be permitted to blur out the fundamental difference under the taxing statute. Did Tonkin's death act as an operating factor or generating source giving rights to any beneficiaries? It obviously did not. In 1936 when the trust was created all the rights of the beneficiaries were forever fixed and certain. Nothing that Tonkin had done or might do could change any rights of the beneficiaries or bring the corpus or the income back to him. There was no shifting in possession or enjoyment at Tonkin's death.

Under these circumstances we do not think that the Goldstone case is controlling. It was decided five days after the arguments in the instant case and neither of the parties had any opportunity to comment on the differences in the two cases. This court should, therefore, grant certiorari so that the novel question as to the taxability of all irrevocable trusts in which the beneficiaries are mortal may be determined by this court.

B.

The Question Whether the Transfers Were Made in Contemplation of Death Was Not Before the Circuit Court.

The opinion of the Circuit Court says:

"* * * the conclusion seems inescapable that the purchase of the single premium life insurance policies and the annuity contracts procured by Tonkin was an indivisible transaction, made in contemplation of death within the meaning of the pertinent section of the Revenue Act. The ultimate distribution of the proceeds of the contracts was suspended until the moment of Tonkin's death." (R. 71)

It is obvious from these two sentences that the court has confused the "contemplation of death theory" and the "taking effect in possession theory." The "contemplation of death theory" was not before the Circuit Court. Indeed no serious effort was ever made by the government to show that the entire trust was made in contemplation of death. On appeal the government definitely abandoned this theory. The briefs of both sides in the Circuit Court make no reference to it, nor does it appear in the "Questions Presented" on page 3 of the government's brief, nor in the "Statement of Points to be Urged" on page 12 of its brief, nor in the "Summary of the Government's Argument" on page 14.

On page 7 of its brief the government specifically says:

"This appeal pertains to the includibility of the proceeds of $200,042.98 of the five single premium policies of insurance in the decedent's gross estate."

Thus the government abandoned the theory that

the *entire* trust was made in contemplation of death and limited its appeal to the position that the proceeds of the five single premium life insurance policies were part of an indivisible transaction with the annuities purchased by Tonkin, so as to constitute a transfer intended to take effect in possession or enjoyment at or after death.

The Circuit Court was not warranted in setting aside findings which the trial court made—findings which were so overwhelmingly supported by the evidence, that the government concluded not to challenge them: *Dobson v. Commissioner,* 320 U. S. 489 (1943); *Oliver v. Bell,* 103 F. 2d 760 (C.C.A. 3, 1939); *Colorado Nat'l Bank v. Com.,* 305 U. S. 23 (1938); *McCaughn v. Real Estate Land Title & Trust Co.,* 297 U. S. 606 (1936).

Whether or not the transfer was made in contemplation of death is an inquiry into the dominant purpose or motives of the settlor in making a transfer. The answer to this question of fact was given by the trial court and was not before the Circuit Court. It is probable that the statement in the opinion that the trust was created in contemplation of death was an inadvertence and that the court intended to say that the purchase of annuities by Tonkin and of single premium life insurance policies by the trustee constituted an indivisible transaction making the transfer one intended to take effect in possession or enjoyment at or after death. But if this is what the court meant, then only the proceeds of the five single premium life insurance policies, to-wit, $200,042.98 are involved and the other two items $36,902.52 and $1840.26 would not be affected. They

would not become taxable and a refund on these two amounts would be due the petitioners.

C.

The Transfer of 2204 Shares of Standard Oil Stock Was Not a Transfer Intended to Take Effect in Possession or Enjoyment at or After Death.

The fundamental question in this case is really whether the transfer of the 2204 shares of Standard Oil stock to the trustee, the subsequent instructions by Mrs. Tonkin to purchase single premium life insurance policies, and the purchase of such policies by the trustee on the one hand and the purchase by Tonkin of annuities on the other constituted such an indivisible transaction as to constitute a transfer intended to take effect in possession or enjoyment at or after death.

The lower court found that the purchase of annuities by Tonkin was a single, independent and separate transaction by which Tonkin gained tax advantages, both federal and state, and diversification in his holdings. The purchase of annuities by Tonkin did not require the trustee or Mrs. Tonkin to do anything. Tonkin's purchases were complete and final in themselves.

True, they made it possible for the trustee to purchase single premium life insurance policies, if Mrs. Tonkin wished it. The lower court found as a fact that Mrs. Tonkin acted freely and independently, and there was no evidence that she was advised or coerced by her husband in the decision that she made. In *Dobson v. Com.*, 320 U. S. 489 (1943) this court said, page 502:

> "Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthesized into one whole transaction is frequently a necessary determination in deciding tax consequences. Where no statute or regulation controls, the tax court's selection of the course to follow is no more reviewable than any other question of fact."

In the absence of any evidence that there was a plan or arrangement between Tonkin, Mrs. Tonkin and the trustee (and the lower court found none), it is difficult to see how the transactions in this case come within any of the provisions of the taxing statute. There is no inference from the fact that a man and woman are married, that one is necessarily under the control of the other: *Estate of Edw. Lathrop Ballard,* 47 B.T.A. 784 (1942), affirmed by the Circuit Court of Appeals of the 2nd Circuit in 138 F. 2d 512 (1943). This case therefore presents a different situation from that in *Helvering v. Le Gierse,* 312 U. S. 531 (1931) and the *Goldstone Case,* 65 Supreme Court 1323 (1945), where the purchases of annuities and single premium policies were made by the decedent.

Section 302(c) provides that property shall be includible in the decedent's gross estate to the extent of any interest of which the decedent has made a transfer to take effect in possession or enjoyment at or after his death or of which he has at any time made a transfer by trust or otherwise under which he has retained for his life the possession or enjoyment of or the right to the income from the property. (p. 17)

How can it be argued that Tonkin retained the possession or enjoyment or the right to the income from the 2204 shares of Standard Oil stock which he transferred to the trustee? He retained nothing from these assets. He received no income from these assets; he had no string attached to these assets; he had forever irrevocably parted with all interest and control in them and left it to his wife and his trustee to determine what they wished to do with them.

Even after the single premium life insurance policies were purchased, the trustee could, under the terms of the trust agreement, have surrendered the policies and made other investments. The situation with which the court is confronted here is therefore different from any other case heretofore decided. The case coming closest in its facts to the instant case is the *Estate of Charles R. Dundore,* decided by the Board of Tax Appeals January 16, 1942, Docket 103899 Memorandum Opinion C.C.H. December, 12244B. There the decedent's wife purchased the single premium life insurance policies on decedent's life with money which the decedent had given her. Previously decedent had applied to the insurance company for an annuity contract. The Board held that the transfer to the wife of the money necessary to purchase the single premium policies was a complete gift without obligation on her part, and that therefore the contention that the gift was intended to take effect in possession or enjoyment at or after death had no basis.

Another case exactly like the case at bar is *Dickson v. Smith,* decided on August 18, 1945 by the District Court of the United States for the Southern District of Indiana (C.C.H. Inheritance, Estate and Gift Tax Serv-

ice, paragraph 10226, page 8271). There the decedent purchased annuities. He gave each of his three children some Inland Steel stock which they sold and, with the proceeds, purchased single premium life insurance policies on the life of their father. The court held that the transfer of the stock to the children "constituted final, complete and absolute gifts to them and there was no understanding or agreement that the children would be required to use the proceeds of the gift in any specified manner." The court concluded that the transfers of stock were not made in contemplation of death or to take effect in possession or enjoyment at or after death.

The transfer by Tonkin of 2204 shares of Standard Oil Company stock to the trustee was a complete and final gift.

We submit, therefore, that the petition for certiorari be granted to review the decision of the Circuit Court of Appeals.

Respectfully submitted,

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